No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITIONER

The National Association of Minority Contractors, appearing as *amicus curiae* in support of the petitioner, urges the reversal of the decision below.*

INTEREST OF AMICUS CURIAE

The National Association of Minority Contractors is a nation-wide organization representing minority-owned companies that are principally engaged in the construction industry. Because of the long existing racial imbalance in the construction industry, most minority contractors are small, new companies. One major barrier these companies face in competing with larger contractors is

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* Petitioner and Respondents have consented to the filing of this Brief Amicus Curiae, and the letters of consent have been filed with the Clerk of the Court.

obtaining workers' compensation insurance at affordable rates. Minority contractors are usually able to compete with the more established, larger non-minority contractors only through federal assistance and through innovative methods of removing financial impediments, such as the cost of obtaining workmen's compensation insurance. The participation of minority contractors in the WMATA construction project has been enhanced by the implementation of WMATA's wrap-up insurance program, which provides compensation insurance for the employees of all contractors working on the project. This program, therefore, eliminates the cost of insurance as an obstacle to minority participation.[1]

The decision below challenges WMATA's wrap-up program as a "deviation from the statutory scheme" of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950 (1976) (hereafter the "LHWCA") (Pet. App. 56a). The decision holds that WMATA had no duty to provide compensation coverage for the employees of its subcontractors and that the wrap-up program was merely a "voluntary act" that does not entitle WMATA to statutory immunity from tort suit under the LHWCA (Pet. App. 52a to 56a).

The decision thus portends the termination of WMATA's wrap-up program and will obviously discourage the use of similar comprehensive insurance programs in other projects subject to the LHWCA. The decision will markedly decrease and probably end the participation of most minority contractors in the WMATA project for two reasons. First, the opinion destroys an insurance program that removed an insurmountable impediment to the participation of minority contractors: the high, and often pro-

[1] WMATA's wrap-up program also provides that the insurance carrier shall "provide construction contract surety bonds to small businesses and minority enterprises," thus meeting another serious financial impediment to minority participation in the WMATA project. *See* WMATA's Joint Appendix at 81, 93-94.

hibitive, cost of compensation coverage for their employees. Second, it will drastically reduce the available federal funds for project construction, because funds must be shifted to cover the costs of the third-party litigation invited by the opinion below.

SUMMARY OF ARGUMENT

The plain language of Section 904 of the LHWCA imposes a straightforward duty on a general contractor to secure the payment of compensation benefits for the employees of its subcontractors. WMATA's wrap-up program met that statutory duty by providing compensation insurance covering all employees engaged in the construction of the WMATA system. Under the rubric of liberal construction, the panel below (hereafter the "Court of Appeals") in effect redrafted Section 904 to deny the existence of this duty and any statutory immunity that would ensue from meeting it.

The result of this judicial legislation is the probable termination of an insurance program that provided compensation coverage for all employees, regardless of the financial ability of their employer. This will reimpose the financial impediment to minority participation presented by the high cost of compensation insurance. Further, it will decrease the opportunities for such participation because WMATA funds, which would otherwise be used for construction, will have to be reallocated to cover the costs of less efficient, individual insurance coverage and the costs of litigating the third-party actions invited by the decision below.

By redrafting Section 904, the Court of Appeals has defeated the LHWCA's goal of continuous compensation coverage for all employees and has seriously impaired the ability of minority contractors to participate in the WMATA project and other projects subject to the Act. Accordingly, the National Association of Minority Contractors respectfully urges the reversal of the decision below.

ARGUMENT

A. The Court of Appeals' Decision Provides Second Recoveries for a Few Employees, While it Eviscerates the Basic Policies and Purposes of the LHWCA to the Detriment of all Employees.

Despite the repeated admonitions of this Court,[2] the Court of Appeals, by its decision, has once again redrafted a provision of the LHWCA under the rejected principle that the LHWCA must be "construed liberally" for the sole benefit of employees (Pet. App. 51a). The Court of Appeals recast Section 904 of the LHWCA,[3] by denying the existence of a duty on general contractors to secure compensation and by creating a new duty that obligates a contractor merely to "require its subcontractors to purchase insurance" (Pet. App. 54a). Having rewritten Section 904, the Court of Appeals then asserted that WMATA's wrap-up insurance program is inconsistent with the Court's revised Section 904 and that WMATA's provision of compensation benefits to the respondents was a "voluntary act" contrary to the LHWCA, which did not entitle WMATA to the *quid pro quo* of statutory immunity (Pet. App. 52a to 56a).

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[2] *Compare Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), *with Potomac Elec. Power Co.* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965); *see also Hilyer* v. *Morrison-Knudsen Construction Co.*, 670 F.2d 708 (D.C. Cir. 1981), *rev'd sub nom. Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 103 S. Ct. 2045 (1983); *Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd sub nom. U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608 (1982); *Potomac Elec. Power Co.* v. *Director, OWCP*, 606 F.2d 1324 (D.C. Cir. 1970), *rev'd*, 449 U.S. 268 (1980).

[3] Section 904(a) provides: "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."

The Court of Appeals' revision of Section 904 defeats the underlying purposes of the LHWCA. These purposes, like those of all workmen's compensation acts, are to ensure the provision of immediate, fixed compensation benefits to injured employees, without regard to fault or resort to litigation, and to impose a limited and determinate liability on the employers required to provide such benefits.[4] Section 904 meets the goal of ensuring compensation by imposing the duty to provide such benefits on "[e]very employer [who] shall be liable and shall secure the payment to his employees of . . . compensation . . . ." If the employer is a subcontractor, the plain language of Section 904 imposes the same employer's duty to secure compensation on the general contractor in order to ensure that all employees in a common enterprise are protected by compensation coverage regardless of the financial viability, ability or responsibility of any employees' immediate employer.[5]

WMATA's wrap-up insurance program clearly met the goals and purposes of the LHWCA because the wrap-up program provided continuous and all-encompassing coverage for every employee engaged in the construction of the WMATA project. This wrap-up program has handled 22,000 claims.[6] The Court of Appeals, however, has rejected this program in order to provide the respondents here (and perhaps the other 22,000 claimants) the ability to obtain a second recovery against the party that secured and paid their compensation benefits. The Court of Appeals ignored the practical and undisputed unavailability

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[4] *See, e.g., Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 281 (1980); *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947).

[5] *Director, OWCP* v. *National Van Lines*, 198 U.S. App. D.C. 239, 613 F.2d 972, 986-987 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *see also* 1C A. Larson, *The Law of Workmen's Compensation* § 49.11, at 9-12 to 9-16 (1982).

[6] *See* Brief for the Petitioner at 36.

of an alternative program for each and every contractor to provide continuous compensation coverage.[7] The Court of Appeals similarly ignored Section 904 and imposed its own system, which, as discussed further below, will invariably lead to gaps in coverage for various employees,[8] particularly those of minority contractors, and will markedly increase third-party litigation.[9]

The Court of Appeals' decision, therefore, defeats the basic goal of the LHWCA and Section 904: it rejects a program that provided coverage to all employees, it subjects the sole purchaser of compensation coverage to unlimited tort liability, and it opens a Pandora's Box of litigation whenever there is a hierarchy of employers or contractors.

B. The Court of Appeals' Decision Will Reimpose An Economic Barrier to Minority Participation that Was Eliminated by WMATA's Wrap-Up Insurance Program.

By holding WMATA's wrap-up program to be a "deviation" from the LHWCA (Pet. App. 55a-56a) and by denying WMATA any *quid pro quo* for implementing the program, the Court of Appeals' decision probably marks the end of that program. The termination of WMATA's wrap-up program would preclude most minority contractors from successfully bidding for construction contracts.[10]

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[7] *Id.* at 20-22.

[8] See discussion at Section C, *infra*.

[9] *See* discussion at Section D, *infra*. *See also* the discussion of the litigation explosion that has already followed this opinion in the Brief for the Petitioner at 36.

[10] WMATA's counsel had early determined that the interstate compact that created WMATA precludes its use of "set-asides" or other techniques that allow minorities to avoid the competitive bidding process. This legal opinion was brought to Congress' atten-

Such action would exacerbate the already-conspicuous racial imbalance in the construction industry.[11] WMATA's wrap-up insurance program was expressly implemented to assure that "no minority contractor will be denied a contract because of his inability to secure General Liability and Workmen's Compensation Insurance." [12] Both Congress and the District of Columbia acknowledged and approved the positive effect of WMATA's wrap-up program for increasing minority participation.[13]

A principal advantage to minority contractors of wrap-up insurance is that it eliminates the cost of insurance when bidding on a project. The fledgling status of many minority contractors makes them an unknown risk to insurance companies. Additionally, minority contractors are often undercapitalized, having little equity with which to guarantee the continuous and timely payment of premiums. It is a common commercial response on the part of the insurance industry to charge an increased premium to such concerns. Unfortunately, these new concerns lack

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tion at the same time Congress was informed of WMATA's wrap-up insurance programs, which made such alternatives unnecessary. *See Hearings on Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 442 (Mar. 20, 1972).

[11] *See, e.g., United Steel Workers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979) (collecting such findings).

[12] Paper on Benefits to Minority Contractors from Coordinated Insurance Program, submitted by WMATA General Manager Jackson Graham to WMATA's Board of Directors on July 20, 1971. A copy of the paper is included in Appendix A to this brief.

[13] A congressional bill to prevent the use of wrap-up programs in the District of Columbia died in committee. H.R. 15627, 91st Cong., 2d Sess. (1970). The District of Columbia opposed the bill on the ground, *inter alia*, that wrap-up programs "would make it easier for smaller companies to participate [in public construction projects]." *See* Letter to The Honorable John J. McMillan from Mr. Graham W. Watt, Ass't to the Commissioner, dated April 3, 1970, and submitted at the April 7, 1970, hearing on the bill. A copy of Mr. Watt's letter is included in Appendix B to this brief.

the profit margins of more established firms, and the additional cost of paying insurance premiums will frequently make the difference between the successful or unsuccessful competitive (lowest) bid.

The reduction of minority participation in projects subject to the LHWCA is directly contrary to the efforts of the federal government to increase minority participation in the construction industry. For example, the Urban Mass Transportation Administration ("UMTA"), which administers the federal funds provided to WMATA, has expressly recommended wrap-up programs as a means of reducing the financial barriers that typically bar minority participation. In fact, UMTA directs applicants for federal funds to consider "providing wrap-up insurance for contractors and subcontractors" as a "means to overcome barriers to [minority] program participation." [14]

Furthermore, a detailed study of wrap-up programs performed for the United States General Services Administration recommended the use of wrap-up programs for all projects exceeding $20 million in total costs, and also expressly recognized that such programs maximize minority participation.[15] A similar study performed for the United States Department of Transportation also recommended the implementation of wrap-up insurance programs for all major construction projects, again noting that such coverage is the only practical way that minority concerns can effectively compete for subcontracts on such projects.[16]

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[14] *See* UMTA, Department of Transportation, Circular C1165.1, p. 14 (Dec. 30, 1977), *superseded by* 49 C.F.R. § 23.45, Appendix A (1982).

[15] *See* General Services Administration, *Wrap Up Study*, p. 14 (Aug. 22, 1975).

[16] *See* Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13, pp. 1-21 (Dept. of Transp. 1977).

C. The Court of Appeals' Decision Will Subject The Employees of Minority Contractors To Periods Without Compensation Coverage.

For those minority contractors who do make successful bids, it is inevitable that their employees will be subjected to periods without compensation coverage, which is a result obviously contrary to the principal purpose of the LHWCA. Many minority contractors do not have the commercial experience and knowledge of the insurance industry to calculate accurately the cost of insurance when submitting a bid that may be two or three years in anticipation of actual work. The premiums for compensation coverage, already high, can sharply increase over the lifetime of a contract because of legislative action and actual loss experience. In areas subject to the LHWCA, rates are based on an employee's salary and the nature of his or her occupation, and comprise approximately two-thirds of the total insurance costs for construction projects.[17] Rates as high as $50 for every $100 in salary can be assessed for tunnel workers.[18] Accordingly, the premiums for compensation insurance constitute a substantial portion of the bid price on a construction contract. If a minority contractor miscalculates the cost of premiums (or any other such substantial cost), the contractor will be faced with the dilemma of making a payroll or paying insurance premiums. The pressures to take the first option are obvious. Any missed premiums would result in the termination of insurance, thereby exposing employees to periods without coverage for compensation and subjecting the contractors to possible criminal penalties. *See* 33 U.S.C. § 938.

Another factor causing lapses in insurance coverage is the utilization of financially uncertain insurance companies. It is an unfortunate fact of commercial life that minority contractors are not attractive as customers for

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[17] *Id.* at 4-1.

[18] *Id.* at 4-2.

established insurance carriers. Many minority contractors are forced to use smaller, fiscally weak insurance companies because they are the only carriers willing to offer them coverage. Such carriers can and do fail for various reasons, again exposing employees to periods without coverage.

D. The Court of Appeals' Decision Will Cause an Enormous Drain on WMATA's Limited Federal Funds, Further Reducing Minority Participation in the Metro Project.

The construction of the WMATA mass transit system is a multi-billion dollar, federally-financed project, with approximately eighty percent of the capital funds provided by the United States.[19] The availability of these funds has steadily declined, which will necessarily cause decreased opportunities for minority participation in the WMATA construction project and in other such programs.[20] The third-party litigation invited by the decision below will result in an enormous drain on these limited federal funds, further decreasing the opportunities for minority contractors to participate in the construction industry.

The Court of Appeals' decision allows any compensation claimant to bring a third-party action against the general contractor who secured the payment of the claimant's compensation benefits. To date, there have been 22,000 such claimants,[21] and the Court of Appeals' decision

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[19] *See* Brief for the Petitioner at 41-42, 44, n. 68.

[20] The federal government has recently set the goals for minority participation in federally-financed transportation projects below the goals previously set by WMATA, thereby causing increased concern by WMATA and the District of Columbia that the level of minority participation in the WMATA project will decrease. *See Metro Is Urged to Set Minority Goals Higher*, Wash. Post, Nov. 24, 1983 at B2.

[21] *See* Brief for the Petitioner at 36.

has already created a litigation explosion of third-party actions against WMATA that are continually being filed and have congested the United States District Court for the District of Columbia.[22] The litigation expenses for defending these actions [23] and the costs of satisfying any judgments could run literally into the millions of dollars. WMATA would have no choice but to cut back on its construction projects and to shift its limited resources to meet these unexpected litigation costs.

The decision below will also cause the needless expenditure of limited funds to pay the increased costs of individual coverage for each subcontractor. Wrap-up programs greatly reduce the administrative costs of insurance and avoid wasteful duplication of effort and overlapping coverage.[24] These increased costs are reflected in higher premiums which subcontractors must include in their bids, thus passing the costs onto the general contractor. The Court of Appeals' rejection of WMATA's wrap-up program will reimpose the higher costs of individual coverage, further reducing the funds available for construction.[25]

Accordingly, the Court of Appeals' decision denies the LHWCA's intent of minimizing litigation and will result in an enormous expenditure of limited funds to cover litigation fees and increased insurance costs, at the expense of public projects and to the detriment of the minority and non-minority contractors that would have

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[22] *See* Brief for the Petitioner at 36.

[23] As this Court and Congress have agreed, the primary beneficiaries of such third-party actions are lawyers, not injured employees. *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 83-86 (1980); *Hearings on H.R. 247, et al., Before Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 106 (1972).

[24] *See* Brief for the Petitioner at 39, n. 56.

[25] *See* Brief for the Petitioner at 40-43.

otherwise participated in the construction of such projects.

E. The Court of Appeals' Decision will Dissuade Contractors from Utilizing Subcontractors Because of their Exposure to Liability for Negligence Actions.

Minority contractors are typically sub-subcontractors on large projects such as the WMATA System. The decision below will subject WMATA's subcontractors to liability for any negligence claims asserted by the injured employees of such sub-subcontractors. An obvious way to eliminate this exposure will be for the contractor or any other intermediate contractor to perform directly the work that would otherwise be subcontracted out to a minority contractor.

Title VI and related statutes prohibit any discrimination in federally-funded programs, including the Metro project.[26] The regulations implementing these statutes affirmatively require WMATA and its subcontractors to utilize good faith efforts to ensure minority participation in the Metro project.[27] These good faith efforts, however, will clearly be tempered by the exposure to common law liability that WMATA's subcontractors will have because of the Court of Appeals' decision. Subcontractors will have to decide between meeting a "good faith efforts" goal of increased minority participation through the use of sub-subcontractors and avoiding liability for third-party actions by not using sub-subcontractors. The pressure to take the latter course is especially powerful with minority contractors, who are typically an unknown risk because they are new concerns without established loss and safety records. Accordingly, the Court of Appeals'

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[26] *See, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-5 (1976); Section 12 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608(f) (1976).

[27] *See* 49 C.F.R. §§ 23.43-23.45 & Appendix A (1983).

redrafting of the LHWCA will unnecessarily frustrate the goals of Title VI and related federal statutes and regulations. By entering the legislative realm, the Court of Appeals has clearly disturbed the delicate balancing of various legislative policies associated with the LHWCA, Title VI, and the other pertinent provisions, statutes, and policies.

CONCLUSION

In order to provide second recoveries for these respondents, the Court of Appeals has ignored Section 904 of the LHWCA and created a new scheme for compensation coverage. The Court of Appeals has rejected a federally-recommended method which ensured that all employees at all times have compensation coverage. This insurance program also greatly enhanced minority participation in the construction of the federally-financed WMATA mass transit system. Without this program, most minority contractors would be unable to continue participation in the project, and the remaining minority contractors would unavoidably subject their employees to periods without compensation coverage, because of the unreliability of the carriers who insure them or because of the minority contractors' inability to meet the large periodic premiums. The decision below, therefore, defeats the goal of the LHWCA to ensure continuous compensation coverage and the goal of the various federal statutes and regulations seeking to enhance minority participation in the construction industry. Once again, the Court of Appeals has demonstrated the pitfalls of judicial intrusion into the legislative realm. This Court has recently reminded the Court of Appeals: "As with other problems of interpreting the intent of Congress in fashioning various details of . . . legislative compromise, the wisest course is to adhere closely to what Congress has written." [28] Accordingly, the National Association of

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[28] *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. at 617.

Minority Contractors respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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APPENDICES

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APPENDIX A

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
950 South L'Enfant Plaza, S.W.
Washington, D.C. 20024

July 20, 1971

MEMORANDUM TO: Chairman and Board of Directors

SUBJECT: Metro Minority Enterprise Program

Attached hereto are copies of the eleven papers scheduled to be presented at the 242nd meeting of the Board of Directors on July 22, 1971. The papers are identified as follows:

Topic A. Background and Status of Minority Enterprise Program

" B. Report on Minority Enterprise Programs of DOT and Eight Local Jurisdictions

" C. Review of Federal and State Laws Relative to Competitive Bidding

" D. Review of WMATA Law Relative to Competitive Bidding—Applicability of SBA 8(a) Program—Possible Language to Amend Compact—Local Community Participation Required by Court Order

" E. Liaison with WACA—Monitoring of Contractors

" F. Benefits to Minority Contractors from Coordinated Insurance Program—Diversion of D.C. Contributions Earnings to Finance Technical Assistance

" G. Sizing of Metro Construction Contracts

" H. Analysis of Rhode Island Station Contract Sizing

" I. Outlook for Minority Prime Contractors on Metro

" J. Minority Contractor Technical Assistance Proposal

" K. Staff Position and Recommendations

/s/ Jackson Graham
JACKSON GRAHAM

* * * *

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
950 South L'Enfant Plaza, S.W.
Washington, D.C. 20024

TOPIC F

I. BENEFITS TO MINORITY CONTRACTORS FROM COORDINATED INSURANCE PROGRAM

The qualified minority contractor is confronted with two major problems as he seeks to become involved in the construction of Metro: 1) meeting the insurance requirements; and 2) meeting the bonding requirements.

The Authority's coordinated insurance program will, in and of itself, resolve in large measure the insurance program. On July 29 the staff will recommend to the Board an insurance carrier to write Workmen's Compensation and primary General Liability insurance for Metro, its contractors and subcontractors. This carrier will also commit itself to participate fully in the SBA (Small Business Administration) bonding program as authorized by the Congress in 1970.

1) *Insurance*: A major benefactor of the Authority's coordinated insurance program is the minority contractor—in two important areas. First, the minority contractor simply cannot provide prudent insurance limits commensurate with the risks involved. Secondly, even in providing minimum insurance limits and coverage he is at an extreme disadvantage costwise in negotiating the insurance contract. Putting it another way, the minority contractor cannot negotiate the kind of favorable position in the procurement of insurance as the large, experienced contractor. Under the Authority's coordinated insurance

program no minority contractor will be denied a contract because of his inability to procure General Liability and Workmen's Compensation insurance. Insurance, with broad coverage and substantial limits, will be provided for him under the program.

2) *Bonding*: Public Law 91-609, effective January 8, 1971, authorizes SBA to guarantee up to 90% of a surety's losses on a particular construction contract. SBA cannot guarantee any contract where the face value exceeds $500,000. To qualify for this program a minority contractor must have had less than $750,000 in gross annual receipts for the past 12 months or averaged less than this amount annually over the past 36 months. With regard to underwriting standards, in a public statement SBA has stated, "We do not want sureties to lower their underwriting standards so as to permit unqualified contractors to get bonded. Rather, we would hope to assist small competent contractors to become more qualified for bonding." The insurance carrier the staff will recommend to the Board on July 29, as stated earlier, will agree to participate fully in the SBA program and will agree to underwrite the remaining 10% risk.

Bonding by itself does not resolve the real problem. As previously reported to the Board, the staff has over a period of months strongly urged the Department of Transportation to fund a technical assistance program for minority contractors. Many minority contractors are denied the right to participate in the construction industry because, even though they may be otherwise qualified, they lack the technical qualifications, management capacity, etc., to be considered qualified for bonding purposes. Favorable action by DOT in funding a technical assistance program would be a significant boost to the Authority's program.

It is also noted that the Board has previously authorized a full-time bonding expert to be employed by the Authority's insurance administrators for the primary purpose of assisting minority contractors in the procurement of bonding.

* * * *

APPENDIX B

[SEAL]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
Washington, D.C. 20004

April 2, 1970

The Honorable John L. McMillan
Chairman
Committee on the District of Columbia
United States House of Representatives
Washington, D.C. 20515

Dear Mr. McMillan:

The Commissioner of the District of Columbia has for report H.R. 15627, a bill "To provide for the fair and impartial letting of public contracts."

The bill would make it the duty of the District's Superintendent of Insurance to make sure that no person acting in an official capacity for the District Government with respect to letting contracts for public buildings and construction shall require the bidder to obtain the insurance or surety bonding necessary for the project from a particular insurer or surety company. The bill further prohibits any District employee or agent from acting in behalf of, or negotiating for, the bidder in obtaining insurance or surety bonds for a project.

The effect of H.R. 15627 would be to make it public policy to have bidders on public construction contracts obtain their own insurance based on what is required in the contract and the private contractor's own needs. This has been the procedure the District Government has been following to date.

However, it has been suggested by some persons knowledgeable in the area of insurance and surety bonding for public construction projects that there may be certain advantages to be gained by having the owner (or, in this case, the District Government) obtain a blanket insurance policy from a single source. Advocates of this method argue that it would save public money and result in more complete coverage for all concerned. Although large contractors are usually able to work out very favorable and continuing arrangements with insurance companies, many small or less-established construction companies find it difficult to obtain the insurance or bonding necessary to participate in public construction projects. A blanket insurance policy obtained by the District Government for all contractors and sub-contractors in a particular project would make it easier for the smaller companies to participate.

Absent sufficient evidence or experience with blanket insurance policies, it is difficult to make a decision on the relative merits of blanket insurance policies versus conventional insurance. At present, the conventional methods have met the needs in the District, but as the insurance market changes and the insurance companies themselves find new ways to present their product, it may well be that in some cases greater economies would be realized by obtaining a blanket policy or some variation of that concept. It does seem quite evident that only in special cases would blanket insurance be useful.

The Commissioner believes that it would be unwise to deny the District Government the opportunity to consider a blanket insurance program when sound public policy indicates that such a program should be considered. Rather, the Commissioner believes that the objective of fair and impartial letting of public contracts would best be served by permitting the District of Columbia Government, in its contracting functions, continued flexibility in determining the terms upon which bids will be based.

For these reasons, the Commissioner recommends against enactment of H.R. 15627.

Sincerely yours,

/s/ Graham W. Watt
GRAHAM W. WATT
Assistant to the Commissioner

FOR: WALTER E. WASHINGTON
Commissioner of the
District of Columbia